

B-Engrossed
Senate Bill 321

Ordered by the House May 21
Including Senate Amendments dated April 19 and House Amendments
dated May 21

Sponsored by Senator THATCHER, Representatives PILUSO, MCLANE, Senator PROZANSKI; Senator MANNING JR, Representative WILLIAMSON (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Modifies procedures by which person convicted of felony initiates proceedings to obtain DNA testing. Directs State Court Administrator to develop forms for use during court proceedings on DNA test requests. Authorizes person requesting testing to file motion requesting property and evidence control and disposition records and other written materials relating to prior forensic testing.

Modifies requirements of motion and accompanying documents for DNA testing. Requires person to serve district attorney with copy of all prior sworn statements of person concerning underlying prosecution. Modifies findings that, if made by court, require court to order DNA testing. Establishes findings that, if made by court, authorize court to order DNA testing.

Creates procedures by which party seeking testing at certain laboratories may request court to order evaluation of laboratory in order for resulting DNA profile to be eligible for entry into state or national DNA index system.

Provides that upon request to district attorney, victim has right to receive notice concerning DNA testing proceedings. Specifies when district attorneys must or may provide notification to crime victims.

A BILL FOR AN ACT

1
2 Relating to post-conviction DNA testing; creating new provisions; and amending ORS 138.690,
3 138.692, 138.694, 138.696, 138.697, 138.698 and 147.433.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Section 2 of this 2019 Act is added to and made a part of ORS 138.690 to**
6 **138.698.**

7 **SECTION 2. As used in ORS 138.690 to 138.698:**

8 (1) "CODIS" means the Combined DNA Index System.

9 (2) "DNA" means deoxyribonucleic acid.

10 (3) "Exculpatory results" and "exculpatory evidence" are limited to those DNA test re-
11 sults or evidence that are material to a determination of the identity of the individual who
12 committed the crime, or whether the crime was committed.

13 (4) "Federal standards" means the Federal Bureau of Investigation Quality Assurance
14 Standards for Forensic DNA Testing Laboratories, as modified or amended by the Federal
15 Bureau of Investigation, or any successor standards adopted by the Federal Bureau of In-
16 vestigation.

17 (5) "National DNA Index System" or "NDIS" means a national, searchable DNA database
18 created and maintained by the Federal Bureau of Investigation where DNA profiles are
19 stored.

20 (6) "NDIS manual" means the Federal Bureau of Investigation's NDIS Operational Pro-

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 cedures Manual, as modified or amended by the Federal Bureau of Investigation, or any
2 successor operational procedures manual.

3 (7) “NDIS-participating laboratory” means a forensic laboratory that has been designated
4 to operate CODIS and participate in the National DNA Index System.

5 (8) “Nonparticipating laboratory” means a laboratory that does not participate in the
6 National DNA Index System but that is accredited by a nonprofit organization and meets
7 federal standards.

8 (9) “State DNA index system” means a statewide, searchable DNA database created and
9 maintained by the Department of State Police where DNA profiles are stored.

10 **SECTION 3.** ORS 138.690 is amended to read:

11 138.690. (1) A person may file in the circuit court in which the judgment of conviction was en-
12 tered a [*motion requesting*] **petition requesting the commencement of a DNA testing proceed-**
13 **ing, and requesting that the court appoint an attorney for the purpose of determining**
14 **whether to file a motion under ORS 138.692 for the performance of DNA [(deoxyribonucleic**
15 **acid)] testing on specific evidence, if the person has been convicted of aggravated murder or a felony**
16 **in which DNA evidence could exist and is [*relevant to establishing an element of the offense*] related**
17 **to the investigation or prosecution that resulted in the judgment of conviction.**

18 (2) After proceedings have been commenced under subsection (1) of this section:

19 (a) Upon motion of the person, the court shall order that the person be provided with a
20 copy of property and evidence control and disposition records for all evidence related to the
21 investigation or prosecution that resulted in the judgment of conviction. If forensic testing
22 on the evidence has previously occurred, the court shall further order that the person be
23 provided with access to the results of the testing and to any other written materials related
24 to the testing, including reports, underlying data, notes and protocols.

25 (b) Upon motion of the person and a showing that good faith efforts to obtain discovery
26 materials from prior defense counsel were made and were unsuccessful, the court shall order
27 that the person be provided reasonable access to discovery materials in the possession of the
28 district attorney and law enforcement agencies that the person would have received under
29 ORS 135.815 prior to trial.

30 (3) At any time after a person files a petition under subsection (1) of this section, the
31 person may file a motion to dismiss the proceeding on the grounds that the person does not
32 wish to proceed with DNA testing. Upon receipt of the motion, the court shall dismiss the
33 petition without prejudice.

34 (4) The court may not charge a fee for any filing under ORS 138.690 to 138.698.

35 (5) The State Court Administrator shall develop forms for proceedings under ORS 138.690
36 to 138.698. The State Court Administrator shall provide the forms to the clerk of each circuit
37 court, who shall make the forms available to the public.

38 (6) ORS 138.690 to 138.698 are not the exclusive means by which a person convicted of a
39 crime may obtain post-conviction DNA testing, and nothing in ORS 138.690 to 138.698 limits
40 or affects any other means by which a person convicted of a crime may obtain post-
41 conviction DNA testing.

42 (7) If the victim did not request notification under ORS 147.433, the district attorney may
43 provide notification upon the filing of a petition under this section if the name and address
44 of the victim are known to the district attorney.

45 **SECTION 4.** ORS 138.692 is amended to read:

1 138.692. [(1)(a)] (1) [When] **After** a person files a [motion] **petition** under ORS 138.690, **the**
2 **person may file a motion** requesting the performance of DNA [(deoxyribonucleic acid)] testing on
3 evidence[.]. The motion must be supported by [an affidavit. The affidavit must]:

4 [(A)] (a) [Contain a statement] **A declaration by the person made under penalty of perjury**
5 that the person is innocent of the offense for which the person was convicted; **and**

6 [(B)] (b) **A statement that:**

7 (A) [Identify] **Identifies** the evidence to be tested with as much specificity as is reasonably
8 practicable [and a theory of defense that the DNA testing would support]. The evidence must have
9 been secured in connection with the prosecution, including the investigation, that resulted in the
10 conviction of the person; [and]

11 [(C)] (B) [Include] **Includes** the results of any previous DNA test of the evidence if a previous
12 DNA test was conducted by either the prosecution or the defense[.];

13 [(b) Consistent with the statement of innocence described in paragraph (a)(A) of this subsection, the
14 person must present a prima facie showing that DNA testing of the evidence would, assuming
15 exculpatory results, lead to a finding that the person is actually innocent of the offense for which the
16 person was convicted.]

17 (C)(i) **The identity of the individual who committed the crime or conduct was at issue in**
18 **the underlying prosecution; or**

19 (ii) **No crime occurred; and**

20 (D) **Explains, in light of all the evidence, how there is a reasonable probability that, had**
21 **exculpatory results been available at the time of the underlying prosecution:**

22 (i) **The person would not have been prosecuted or convicted of the offense; or**

23 (ii) **There would have been a more favorable outcome to the underlying prosecution.**

24 (2) **Concurrently with the filing of a motion under this section, the person shall serve the**
25 **district attorney with:**

26 (a) **A copy of any prior sworn testimony by the person concerning the underlying prose-**
27 **cution, including but not limited to affidavits, declarations, depositions and any testimony**
28 **from the person in a prior post-conviction relief action challenging the conviction; or**

29 (b) **A document affirming that there are no prior sworn statements.**

30 (3) **A person may file a motion under this section notwithstanding the fact that the per-**
31 **son pleaded guilty or no contest to the underlying conviction or, before or after conviction,**
32 **made a confession or admission.**

33 [(2)] (4) **Upon being served as described in subsection (2) of this section,** the state shall
34 answer the motion requesting the performance of DNA testing and may refute the basis for the
35 motion.

36 [(3)] (5) Upon the motion of a party or the court's own motion, the court may allow the testi-
37 mony of witnesses if the testimony will assist the court in making its determination to grant or deny
38 the motion requesting the performance of DNA testing. The court may not allow testimony from the
39 victim of the offense without the consent of the victim.

40 [(4)] (6) The court shall order the DNA testing requested in a motion under subsection (1) of this
41 section if the court finds that:

42 [(a) The requirements of subsection (1) of this section have been met;]

43 [(b)] (a) Unless the parties stipulate otherwise, the evidence to be tested has been subject to a
44 chain of custody sufficient to establish that the evidence has not been altered in any material as-
45 pect;

1 [(c)] **(b)** The motion is made for the purpose of demonstrating the innocence of the person of the
2 offense and not to delay the execution of the sentence or administration of justice; [and]

3 **(c)(A) The identity of the individual who committed the crime or conduct was at issue in**
4 **the underlying prosecution; or**

5 **(B) If the person alleges that no crime occurred, the testing could not have been obtained**
6 **during the criminal proceedings with the exercise of reasonable diligence; and**

7 (d) [There is a reasonable possibility, assuming exculpatory results, that the testing would lead to
8 a finding that the person is actually innocent of the offense for which the person was convicted] **In**
9 **light of all the evidence, there is a reasonable probability that, had exculpatory results been**
10 **available at the time of the underlying prosecution, the person would not have been prose-**
11 **cuted or convicted of the offense.**

12 **(7) The court may order the DNA testing requested in a motion under subsection (1) of**
13 **this section if the court finds that:**

14 (a) **Unless the parties stipulate otherwise, the evidence to be tested has been subject to**
15 **a chain of custody sufficient to establish that the evidence has not been altered in any ma-**
16 **terial aspect;**

17 (b) **The motion is made for the purpose of demonstrating the innocence of the person of**
18 **the offense and not to delay the execution of the sentence or administration of justice;**

19 **(c)(A) The identity of the individual who committed the crime or conduct was at issue in**
20 **the underlying prosecution; or**

21 **(B) If the person alleges that no crime occurred, the testing could not have been obtained**
22 **during the criminal proceedings with the exercise of reasonable diligence; and**

23 (d) **In light of all the evidence, there is a reasonable probability that, had exculpatory**
24 **results been available at the time of the underlying prosecution, there would have been a**
25 **more favorable outcome to the underlying prosecution.**

26 [(5)] **(8)** In granting a motion under this section, the court may impose reasonable conditions
27 designed to protect the interests of the state in the integrity of the evidence and the testing process.

28 **(9)(a) If a motion is granted under this section, the district attorney shall notify the**
29 **victim if the name and address of the victim are known to the district attorney.**

30 (b) **The district attorney may notify the victim of the results of DNA testing ordered**
31 **under this section.**

32 [(6)] **(10)** Unless both parties agree or the court finds compelling circumstances otherwise, the
33 court shall order the Department of State Police to conduct the DNA testing. The court may order
34 a second test upon a showing that the state police failed to follow appropriate DNA protocols and
35 that failure reasonably affected the accuracy of the DNA test.

36 **(11) A party seeking entry into the National DNA Index System or State DNA Index**
37 **System of any unknown DNA profile generated through DNA testing ordered under this**
38 **section shall comply with section 8 of this 2019 Act.**

39 [(7)] **(12)** The costs of DNA [tests] **testing** ordered under this section must be paid by:

40 (a) The person making the motion for DNA testing if the person is not incarcerated or, if the
41 person is incarcerated, if the person is financially able to pay; or

42 (b) The state if counsel at state expense has been appointed under ORS 138.694.

43 [(8)] **(13)** The laboratory conducting the DNA test shall provide [a copy of] **access to** the results
44 of the test **and to any other written materials related to the testing, including reports,**
45 **underlying data, notes and protocols,** to the person filing the motion and to the state.

1 [(9)] (14) Notwithstanding the fact that an appeal of the conviction or a petition for post-
2 conviction relief in the underlying case is pending at the time a motion is filed under [ORS
3 138.690] **this section**, the circuit court shall consider the motion. If the court grants the motion, the
4 court shall notify the court considering the appeal or post-conviction petition of that fact. When a
5 court receives notice under this subsection, the court shall stay the appeal or post-conviction pro-
6 ceedings pending the outcome of the motion filed under [ORS 138.690] **this section** and any further
7 proceedings resulting from the motion.

8 [(10)] (15) The court shall make **written** findings when issuing an order under this section.

9 **SECTION 5.** ORS 138.694 is amended to read:

10 138.694. (1) A person described in ORS 138.690 is entitled to counsel during all stages of the
11 proceedings described in ORS 138.692, 138.696 and 138.697 **and section 8 of this 2019 Act**.

12 (2) A person described in ORS 138.690 may file a petition in the circuit court in which the
13 judgment of conviction was entered requesting the appointment of counsel at state expense to assist
14 the person in determining whether to file a motion under ORS [138.690] **138.692**. The petition must
15 be accompanied by:

16 (a) A completed affidavit of eligibility for appointment of counsel at state expense; and

17 (b) An affidavit stating that:

18 (A) The person meets the criteria in ORS 138.690;

19 (B) The person is innocent of the charge for which the person was convicted; and

20 (C) The person is without sufficient funds and assets, as shown by the affidavit required by
21 paragraph (a) of this subsection, to hire an attorney to represent the person in determining whether
22 to file a motion under ORS [138.690] **138.692**.

23 (3) The court shall grant a petition filed under this section if:

24 (a) The petitioner complies with the requirements of subsection (2) of this section; and

25 (b) It appears to the court that the petitioner is financially unable to employ suitable counsel
26 possessing skills and experience commensurate with the nature and complexity of the matter.

27 (4) An attorney appointed under this section:

28 (a) If other than counsel provided pursuant to ORS 151.460, is entitled to compensation and ex-
29 penses as provided in ORS 135.055; or

30 (b) If counsel provided pursuant to ORS 151.460, is entitled to expenses as provided in ORS
31 135.055.

32 **SECTION 6.** ORS 138.696 is amended to read:

33 138.696. (1) If DNA [(deoxyribonucleic acid)] testing ordered under ORS 138.692 produces incon-
34 clusive evidence or evidence that is unfavorable to the person requesting the testing:

35 (a) The court shall forward the results to the State Board of Parole and Post-Prison Supervision;
36 and

37 (b) The Department of State Police shall compare the evidence to DNA evidence from unsolved
38 crimes in the Combined DNA Index System.

39 (2) If DNA testing ordered under ORS 138.692 produces exculpatory evidence, the person who
40 requested the testing may file in the court that ordered the testing a motion for a new trial based
41 on newly discovered evidence. Notwithstanding the time limit established in ORCP 64 F, a person
42 may file a motion under this subsection at any time during the 60-day period that begins on the date
43 the person receives the test results.

44 (3) Upon receipt of a motion filed under subsection (2) of this section and notwithstanding the
45 time limits in ORCP 64 F, the court shall hear the motion pursuant to ORCP 64.

1 (4) If the court orders a new trial in response to a motion described in this section, the
2 district attorney shall notify the victim.

3 **SECTION 7.** Section 8 of this 2019 Act is added to and made a part of ORS 138.690 to
4 138.698.

5 **SECTION 8.** (1) If DNA testing ordered under ORS 138.692 produces an unidentified DNA
6 profile, upon motion of a party the court may order an NDIS-participating laboratory within
7 this state to:

8 (a) Enter the DNA profile into the National DNA Index System; or

9 (b) Enter the DNA profile into the State DNA Index System if the profile meets all ap-
10 plicable requirements.

11 (2) Notwithstanding subsection (1)(a) of this section, the DNA profile shall only be com-
12 pared to the National DNA Index System if the state administrator of the Combined DNA
13 Index System determines that:

14 (a) The forensic sample has a nexus to the crime scene, is probative, and was suitable
15 for analysis;

16 (b) The DNA profile was generated through a technology that complies with all require-
17 ments in the NDIS manual and federal standards; and

18 (c) The DNA profile meets all requirements in the NDIS manual for entry.

19 (3)(a) If a party to post-conviction DNA testing proceedings seeks to conduct the testing
20 at a nonparticipating laboratory and intends to have any DNA profile resulting from the
21 testing submitted to the National DNA Index System or the State DNA Index System, the
22 party may identify an NDIS-participating laboratory within this state and request the court,
23 by motion, to order the NDIS-participating laboratory to evaluate whether the nonpartic-
24 ipating laboratory is in compliance with federal standards for the purpose of uploading DNA
25 profiles to CODIS. The party shall provide notice of the requested order to the opposing party
26 and to the NDIS-participating laboratory identified in the motion.

27 (b) The state may appear on the motion as a party to post-conviction DNA testing pro-
28 ceedings or on behalf of the NDIS-participating laboratory if the laboratory is a public entity.

29 (4) The court may order the NDIS-participating laboratory to conduct an evaluation
30 pursuant to subsection (3) of this section if the moving party demonstrates and the court
31 finds that:

32 (a)(A) The NDIS-participating laboratory is not able to, or for practical reasons has de-
33 termined not to, perform the specific testing and analysis sought by the moving party;

34 (B) The NDIS-participating laboratory's testing and analysis would not be substantially
35 equivalent to testing and analysis by the nonparticipating laboratory; or

36 (C) Testing and analysis by the NDIS-participating laboratory would not otherwise be
37 appropriate;

38 (b) The evaluation will not delay investigations or unduly burden the resources of the
39 NDIS-participating laboratory; and

40 (c) There is a reasonable likelihood that the evaluation would result in a finding that:

41 (A) The nonparticipating laboratory is in compliance with federal standards; and

42 (B) If a DNA profile is generated from testing by the nonparticipating laboratory, the
43 profile would meet all requirements in the NDIS manual and federal standards.

44 (5) If the court orders an evaluation of a nonparticipating laboratory under subsection
45 (4) of this section, within 120 days of receiving the court order, the NDIS-participating labo-

1 ratory shall comply with the order as follows:

2 (a) The NDIS-participating laboratory may conduct the evaluation by obtaining and re-
3 viewing the records of an on-site visit and assessment of the nonparticipating laboratory
4 previously conducted by the Federal Bureau of Investigation or an NDIS-participating labo-
5 ratory.

6 (b) If a previously conducted on-site visit and assessment were not conducted within a
7 time frame required by federal law, the results of the previously conducted on-site visit and
8 assessment are unavailable, or the nonparticipating laboratory is not in compliance with
9 other applicable standards, the NDIS-participating laboratory may:

10 (A) Evaluate the nonparticipating laboratory by conducting a new on-site visit and as-
11 sessment, provided that:

12 (i) The ability to conduct the new on-site visit and assessment is within the limits of
13 available resources of the NDIS-participating laboratory;

14 (ii) The nonparticipating laboratory agrees to cooperate with the new on-site visit and
15 assessment; and

16 (iii) The moving party bears the costs associated with the new on-site visit and assess-
17 ment; or

18 (B) Notify the court of the inability to evaluate the nonparticipating laboratory by con-
19 ducting a new on-site visit and assessment due to the available resources of the
20 NDIS-participating laboratory, a refusal by the nonparticipating laboratory to cooperate with
21 the on-site visit and assessment or the refusal by the moving party to bear the costs asso-
22 ciated with the new on-site visit and assessment.

23 (6) A determination by the NDIS-participating laboratory as to whether the nonpartic-
24 ipating laboratory is in compliance with federal standards is not subject to judicial review.

25 (7) Should any provision of a court order under this section be determined to violate
26 federal law, the NDIS manual, or any memorandum of understanding between the Federal
27 Bureau of Investigation and the Department of State Police concerning forensic laboratories,
28 that portion of the order shall be considered unenforceable and the remaining portions of the
29 order remain in effect.

30 **SECTION 9.** ORS 138.697 is amended to read:

31 138.697. (1) A person described in ORS 138.690 may appeal to the Court of Appeals from a circuit
32 court's final order or judgment denying or limiting DNA [*deoxyribonucleic acid*] testing under ORS
33 138.692, denying appointment of counsel under ORS 138.694 or denying a motion for a new trial
34 under ORS 138.696.

35 (2) The state may appeal to the Court of Appeals from a circuit court's final order or judgment
36 granting a motion for DNA testing under ORS 138.692 or granting a motion for a new trial under
37 ORS 138.696.

38 (3) The time limits described in ORS 138.071, the notice requirements described in ORS 138.081
39 and 138.090 and the provisions of ORS 138.225, 138.227, 138.255 and 138.257 apply to appeals under
40 this section unless the context requires otherwise.

41 (4) A circuit court shall appoint counsel to represent a person described in ORS 138.690 on ap-
42 peal in the same manner as for criminal defendants under ORS 138.500.

43 **SECTION 10.** ORS 138.698 is amended to read:

44 138.698. When a conviction has been set aside as the result of evidence obtained through DNA
45 [*deoxyribonucleic acid*] testing conducted under ORS 138.692, the prosecution of any offense that

1 was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has
2 been set aside may be commenced within the later of:

3 (1) The period of limitation established for the offense under ORS 131.125 to 131.155; or

4 (2) Notwithstanding ORS 131.125 and 131.155, two years after the date the conviction was set
5 aside.

6 **SECTION 11.** ORS 147.433 is amended to read:

7 147.433. (1) To accord crime victims due dignity and respect, a victim in a criminal proceeding
8 described in subsection (2) of this section has, upon request to the district attorney before a judg-
9 ment of conviction is entered, the following rights:

10 (a) The right to be notified by the district attorney of the victims' rights described in this sec-
11 tion and ORS 138.627 and 144.750;

12 (b) The right to reasonable, accurate and timely notice from the Attorney General when an ap-
13 peal is taken in the criminal proceeding;

14 (c) The right to reasonable, accurate and timely notice from the counsel for the state when a
15 conviction in the criminal proceeding is the subject of a petition for post-conviction relief filed under
16 ORS 138.510 to 138.680 **or post-conviction DNA (deoxyribonucleic acid) testing under ORS**
17 **138.690 to 138.698;**

18 (d) The right to attend any public hearing related to the criminal proceeding that is conducted
19 by an appellate court; and

20 (e) The right to be reasonably protected from the offender, if the offender is present, at any re-
21 lated appellate or post-conviction relief proceeding.

22 (2) The provisions of this section apply only to criminal proceedings involving a defendant
23 charged with or convicted of:

24 (a) A person felony, as that term is defined in the rules of the Oregon Criminal Justice Com-
25 mission;

26 (b) A person Class A misdemeanor, as that term is defined in the rules of the Oregon Criminal
27 Justice Commission;

28 (c) Burglary in the first degree under ORS 164.225;

29 (d) A sex crime as defined in ORS 163A.005; or

30 (e) An attempt, conspiracy or solicitation to commit a crime described in paragraph (a) or (b)
31 of this subsection.

32 (3) As used in this section, "victim" has the meaning given that term in ORS 131.007.
33